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California Bldg. Indus. Ass'n. v. City of San Jose

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San Jose's inclusionary housing ordinance was merely a land use restriction, not a taking of developer's property. Affordable housing ordinances are valid if they bear reasonable relationship to public welfare.

California Bldg. Indus. Ass'n v City of San Jose (2015) 61 C4th 435

THE EDITOR'S TAKE: If an inclusionary housing ordinance is regarded as an "exaction"—because it compelled a developer to pay through land dedication or in-lieu fees—then the city must show that (1) there was a reasonable relationship between the deleterious effects of the new housing and the economic burden imposed on the developer—the nexus—and (2) the burden is reasonably proportional to the problems created by the development. On the other hand, if the ordinance is viewed as an ordinary land use regulation, which only incidentally reduced a developer's profits—like a requirement of a smaller building footprint or greater setback lines—then the city need only show that the ordinance bore a reasonable relationship to a legitimate public interest. I think an ordinance like San Jose's was both an exaction and a regulation, meaning that judges can choose to characterize it either way. That means that as an exaction, it will probably never be upheld, but as a regulation, it will probably always survive.

This decision by the California Supreme Court has opened the door to the enactment of inclusionary housing ordinances throughout the state, with other communities simply copying the findings and mechanisms of what San Jose did. That door would have been effectively slammed shut had the court treated the ordinance as an exaction instead. Large political consequences depend on a very fuzzy distinction. Will the United States Supreme Court see it through the same blurry spectacles?—*Roger Bernhardt*

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